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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. TOMAS JACKSON, Defendant and Appellant.	A152973 (San Francisco City & County Super. Ct. No. 227112)

Tomas Jackson appeals his convictions for possession of psilocybin and possession of LSD (Health & Saf. Code, § 11377) following a jury trial. The appeal turns on whether the trial court correctly denied a pretrial motion to suppress evidence under Penal Code section 1538.5[1] and a subsequent pretrial motion to set aside the information under section 995. In both motions, Jackson argued that his arrest was without probable cause and thus the drugs seized in a search incident to his arrest were inadmissible under the fruit of the poisonous tree doctrine of *Wong Sun v. United States* (1963) 371 U.S. 471. He reasserts that argument here on appeal. We reject it and will affirm.

I. BACKGROUND

Officer James Tacchani is qualified as an expert in the recognition and possession for sale of psilocybin and marijuana. On the afternoon of December 9, 2016, Officer Tacchani was in plain clothes patrolling part of Golden Gate Park known as the Alvord Lake area. Alvord Lake is well known for the sales, possession, and purchasing of

[1] Statutory references, unless otherwise indicated, are to the Penal Code.

narcotics, Officer Tacchani had previously made numerous drug-related arrests in the vicinity.

While patrolling, Officer Tacchani noticed Jackson a short distance away from him, sitting under a tree by himself. Officer Taccahani saw Jackson look at the contents of a glass jar and then bring the jar up to his nose and smell it.

His curiosity piqued, Officer Tacchani approached Jackson to see what he was doing. As he approached, the officer observed that Jackson had multiple small "clear Ziploc" baggies in the jar that, based on his training and experience, the officer suspected were filled with marijuana. Officer Tacchani believed that Jackson was intending to sell the marijuana, and arrested him for possession with intent to sell. The individual baggies contained .74 grams of marijuana in total.

Immediately upon arresting Jackson, Officer Tacchani searched Jackson's backpack. The officer recognized the backpack from previous encounters with Jackson. The search of the backpack yielded "three individually wrapped bags of suspected psilocybin, as well as a scale," "several empty baggies," and more "suspected marijuana" packaged in three separate sandwich bags. A further search of Jackson's person at the police station revealed $148 and some suspected LSD tablets. The psilocybin and LSD found during the searches subsequent to Jackson's arrest provide the basis for the convictions in this case.

Jackson was not charged with possession for sale of the marijuana. He was charged with possession for sale of psilocybin (Health & Saf. Code, § 11378) and simple possession of LSD (Health & Saf. Code, § 11377). Jackson moved to suppress the drugs as evidence at his preliminary hearing. The motion was denied on the ground Officer Tacchani had probable cause to arrest Jackson before the search.

Jackson was held to answer on the psilocybin and LSD charges, as well as an additional charge of possession of LSD for sale. He was subsequently charged with possession for sale of both substances in an information. He then filed a section 995 motion to set aside the information, renewing his motion to suppress, which was denied.

After a jury trial, he was acquitted of possession for sale on both counts, but convicted of two counts of simple possession.

II. DISCUSSION

A. Governing Legal Principles and Standard of Review

The Fourth Amendment guarantees individuals the right to be free from "*unreasonable* searches and seizures." (U.S. Const., 4th Amend., italics added.) An arrest constitutes a seizure implicating Fourth Amendment protections. (*California v. Hodari D.* (1991) 499 U.S. 621, 624 [an arrest is the "quintessential 'seizure of the person' under . . . Fourth Amendment jurisprudence"].)

"Section 1538.5 affords criminal defendants a procedure by which they may seek suppression of illegally seized evidence [in violation of the Fourth Amendment]. (§ 1538.5, subds. (a)(1), (d), (f)(1), (i), (m).)" (*People v. Romeo* (2015) 240 Cal.App.4th 931, 940 (*Romeo*).) "In ruling on a motion to suppress, the trial court must find the historical facts, select the rule of law, and apply it to the facts in order to determine whether the law as applied has been violated. [Citation.] We review the court's resolution of the factual inquiry under the deferential substantial evidence standard. Whether the relevant law applies to the facts is a mixed question of law and fact that is subject to independent review." (*People v. Thompson* (2010) 49 Cal.4th 79, 111–112; see *Romeo, supra,* 240 Cal.App.4th at pp. 940–942.)

"When a suppression motion is made before a magistrate in conjunction with a preliminary hearing, as in this case, the magistrate tries the facts, resolving credibility issues and conflicts in the evidence, weighing the evidence, and drawing appropriate inferences. [Citations.] If the magistrate denies the motion and holds the defendant to answer, the defendant must, as a prerequisite to appellate review, renew his challenge before the trial court by motion to dismiss under section 995 or in a special hearing. [Citations.] At that stage, the evidence is generally limited to the transcript of the preliminary hearing, testimony by witnesses who testified at the preliminary hearing (who may be recalled by the prosecution), and evidence that could not reasonably have been presented at the preliminary hearing. (§ 1538.5, subd. (i).) The factual findings of

the magistrate are binding on the court, except as affected by any additional evidence presented at the special hearing." (*Romeo, supra,* 240 Cal.App.4th at p. 941.)

"After submission on the transcript at the special hearing, the appellate court, like the superior court, is bound by the magistrate's factual findings so long as they are supported by substantial evidence." (*Romeo, supra*, 240 Cal.App.4th at p. 941.) "Where the facts are not in conflict, the issue of probable cause is a question of law reviewable de novo on appeal. [Citations.] We look to whether facts known to the arresting officer 'at the moment the arrest was made' [citation] ' " would persuade someone of 'reasonable caution' that the person to be arrested has committed a crime." ' " (*Cornell v. City and County of San Francisco* (2017) 17 Cal.App.5th 766, 779 (*Cornell*).)

" 'The rule of probable cause is a practical, nontechnical conception' that turns on an assessment of the facts gathered by the arresting officer in the field [citation] and is not governed by courtroom standards of proof. [Citation.] Many verbal formulae have been used to describe it, but distilled to their essence ' "[t]he substance of all the definitions" . . . "is a reasonable ground for belief of guilt" ' [citation], where the belief is "particularized with respect to the person to be . . . seized.' " ' " [Citation.] [¶] "The legal standard we apply to assess probable cause is an objective one in which the subjective motivations of the arresting officers have no role. [Citations.] But it is an overstatement to say that what is in the mind of an arresting officer is wholly irrelevant, for the objective test of reasonableness is simply a measure by which we assess whether the circumstances as subjectively perceived by the officer provide a reasonable basis for the seizure." (*Cornell, supra,* 17 Cal.App.5th at p. 779.)

When an arrest is supported by probable cause, a subsequent search incident to that arrest of the suspect's person and belongings within their immediate control "requires no additional justification." (*United States v. Robinson* (1973) 414 U.S. 218, 235; see also *Chimel v. California* (1969) 395 U.S. 752, 762–763 [explaining that lawful arrest justifies incidental search of area within suspect's "immediate control"].)

B. Analysis

Jackson contends the trial court's finding of probable cause here was erroneous based on *Cunha v. Superior Court* (1970) 2 Cal.3d 352 (*Cunha*). We disagree. In *Cunha,* two plainclothes police officers observed two people, with whom they were unfamiliar, walking down the sidewalk in a high narcotics trafficking area of Berkeley, California. (*Cunha*, *supra*, at pp. 354–355.) The officers became suspicious of the pedestrians when they looked behind them as though they were nervous someone might be watching them. (*Id*. at p. 355.) After the two pedestrians walked 40 to 50 feet away, out of the plain view of the officers and partially obstructed from the officer's view by a fence and a vehicle, the suspects appeared to reach into their pockets and then make a hand-to-hand exchange of what the testifying officer admitted were indiscernible items. (*Ibid*.) The officers, without any further evidence of a crime, arrested the suspects " 'to determine whether or not a narcotic transaction had been made.' " (*Ibid.*) A search incident to that arrest yielded heroin and currency.

The officers' justification for the arrest in *Cunha* was based on nothing more than a hunch unsupported by constitutionally required " 'specific and articulable facts which, taken together with rational inferences from those facts,' " would constitute probable cause. (*Cunha, supra,* 2 Cal.3d at p. 356.) The court found that the officers justified the arrest "solely upon [their] observations that petitioner and his companion looked around as they walked on a public sidewalk in broad daylight, and apparently engaged in some sort of transaction in an area known for frequent narcotics traffic." (*Id.* at p. 357.) The fact that an area is "known to be the site of frequent narcotics traffic," in and of itself, "should not be deemed to convert circumstances as innocent as an apparent transaction by pedestrians who seem generally concerned with their surroundings into sufficient cause to arrest those pedestrians." (*Ibid*.)

In this case, Officer Tacchani, an expert in drug recognition, was patrolling a public area that was well known for drug sales. Unlike the circumstances at issue in *Cunha*, the area was but one of the permissible considerations contributing to his suspicion. (See *People v. Huggins* (2006) 38 Cal.4th 175, 242 [" 'An individual's

presence in an area of expected criminal activity, standing alone, is not enough to support a reasonable, particularized suspicion that the person is committing a crime. [Citation.] But officers are not required to ignore the relevant characteristics of a location in determining whether the circumstances are sufficiently suspicious to warrant further investigation.' "].)

Jackson was sitting under a tree by himself smelling the contents of a jar in plain view. Officer Tacchani's training and experience and the nature of criminal activity in the area, led him to be suspicious of what was in the jar. Based on that suspicion, Officer Tacchani approached Jackson, and as he approached it became immediately apparent from what he saw that the jar contained small marijuana packages. When an officer, from a lawful vantage point, observes a defendant has a controlled substance in the officer's plain view, and the " 'incriminating character' " of that substance is " ' "immediately apparent," ' " further investigation into the matter does not violate the Fourth Amendment. (*Minnesota v. Dickerson* (1993) 508 U.S. 366, 375.) The packages in Jackson's jar were discernible to the arresting officer, which was not the case with the items handed between the pedestrians in *Cunha*. Based on his training and experience, Officer Tacchani suspected that Jackson intended to offer the marijuana packaged in this way for sale in violation of Health and Safety Code section 11359. He therefore arrested Jackson based on his observations of evidence of what appeared to be criminal activity.

In their totality, the circumstances presented here differ substantially from the dragnet for possible criminality at issue in *Cunha*. When Officer Tacchani initially approached Jackson, the encounter was consensual and did not require reasonable suspicion. "The United States Supreme Court has made it clear that a detention does not occur when a police officer merely approaches an individual on the street and asks a few questions." (*In re Manuel G.* (1997) 16 Cal.4th 805, 821.) Even if reasonable suspicion were required, Officer Tacchani's observations of what Jackson was doing and what he was holding constitute " 'specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant' " further investigation. (*Cunha, supra,* 2 Cal.3d at p. 356.) Once he saw the packages of marijuana in the jar, his observations

would have led a person " 'of ordinary care and prudence to believe, or to entertain a strong suspicion,' " that Jackson was selling, or was intending to sell, marijuana. (*Ibid.*) By the time he arrested Jackson, Officer Tacchani had probable cause to arrest him for possession of marijuana for sale (Health & Saf. Code, § 11359). (See *People v. Walker* (2015) 237 Cal.App.4th 111, 114, 117 [individual packaging consistent with possession for sale].)

Accordingly, we are satisfied there was ample basis in the record to sustain Jackson's arrest for possession with intent to sell. It makes no difference he had only a small quantity of marijuana. Given the style of packaging of the items in the jar and the area in which the drugs were seized, the quantity has no relevance. Possession of any amount with the intent to offer it for sale was an offense. (See Health & Saf. Code, § 11359 ["Every person who possesses for sale *any cannabis* . . ." (italics added)].) Contrary to Jackson's contention, the Adult Use of Marijuana Act (AUMA)[2] does not abrogate restrictions on possession for sale imposed by section 11359.

Because Jackson's arrest did not violate the Fourth Amendment, the subsequent search of his backpack incident to his lawful arrest was valid, requiring no further justification. Thus, the fruit of the poisonous tree doctrine has no application.

III. DISPOSITION

Affirmed.

[2] Voters passed Proposition 64 on November 8, 2016. Proposition 64 enacted the AUMA. The new law was effective at the time of Jackson's arrest. It decriminalizes possession of small amounts of marijuana by persons over 21 years of age for personal use. (See Prop. 64, as approved by voters, Gen. Elec. (Nov. 8, 2016); Sen. Bill No. 94 (2017 Reg. Sess.), Stats. 2017, ch. 27, §§ 1, 129; see also Health & Saf. Code, § 11362.1, subd. (a).)

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STREETER, J.

WE CONCUR:

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POLLAK, P. J.

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BROWN, J.